No. 126.
Reply Brf. of Beebe for Appellant.
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OCTOBER TERM, 1900.

No. 126.

D. MARX, APPELLANT,

vs.

WILLIAM M. EBNER ET AL.

APPELLANT'S BRIEF IN REPLY.

W. SCOTT BEEBE,
Attorney for Appellant.

(17,499.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-16-'01

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In the brief for appellees certain principles are invoked to which appellant deems it proper to reply.

I.

Appellees claim that if the court granting the order of publication "is satisfied," that in such case the law is satisfied, and that further inquiry is precluded.

Appellant maintains that no court has ever so held. In the cases cited the statutes of the States contain the same

provision as the Oregon Code, viz., that when the jurisdictional facts "appear *by affidavit to the satisfaction of the court or judge* thereof," then he may grant the order of publication, and all courts hold that he must be *legally* satisfied, and that the evidence upon which he acts must be competent and must appear affirmatively in the affidavit. Outside knowledge or rumor or belief is not sufficient and will not operate as a basis for the "satisfaction" contemplated by the statute.

Kilmer *vs.* Railroad, 37 Kansas, 84.

Alderson *vs.* Marshall, 7 Mont., 288, and cases heretofore cited.

The Oregon, Montana, and California cases certainly so decide, and this court in Galpin *vs.* Page, 85 U. S., 350, cite with approval Rickertson *vs.* Richardson, heretofore cited, and says:

"The record shows that the defendant was beyond the reach of the process of the court. All presumption of jurisdiction over her person, which otherwise might have been indulged in, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained. The statute provides in case of absent and non-resident defendants for constructive service of process by publication. It requires an order of the court or judge before such publication can be made, it designates the facts which must exist to authorize the order, and *the manner in which such facts must be made to appear.*"

In the Oregon case of McDonald *vs.* Cooper, 32 Fed., 748, the court held that legal evidence upon which the judicial mind can act must appear in the affidavit before the judge

can grant the order, and this is so held to enter directly or substantially in all the cases upon the subject.

II.

That a sale upon execution operates to pass the title notwithstanding the judgment or decree upon which it is issued is void.

This would be a monstrous doctrine, if true; but it is not the law. If the decree is void, so are all the proceedings connected with it. The section of the Oregon Code cited does not refer to void judgments, but to judgments reversed on appeal, and to voidable proceedings. If that section included void sales it would certainly be held inoperative by the courts. It would be of no more validity than an enactment that a sale upon execution might be had without judgment or without giving the defendant his day in court. Such a law would be invalid, because it operated to take a man's property without due process of law. This question is settled in appellant's favor in that State, and it is there held, in Hoxter *vs.* Poppleton, 9 Oreg., 481, that "the rule of caveat emptor applies to sheriffs' sales of real or personal property by virtue of an execution. *If the judgment is void* or has been paid, the officer's power is at an end and the purchaser takes nothing."

III.

Lastly, it is contended that appellant stood by, saw valuable improvements placed on the property without objecting thereto, and therefore is estopped from claiming

the property even, if the decree is void. In a proper case this doctrine is equitable, but it has no application in a case like this. The record does not contain one word that appellant stood by and saw improvements placed on the property, or that he was aware of the proceedings. Appellees claimed that appellants were without the district, and it nowhere appears that appellees ever expended one dollar on the property, but it does appear and is a fact that they have been very industrious in using the property, mill, and appliances placed there by the mortgagor, and have taken a large amount of gold from the mine. Again, they were holding under the purchaser at the sale, who was the plaintiff in the action. They all knew the condition of the title—their own records disclosed that—and this court has said that "where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel."

Brant *vs.* Coal & Iron Co., 93 U. S., 326.
Henshaw *vs.* Bissell, 18 Wall., 255.
Steel *vs.* Smelting Co., 106 U. S., 456.

Another conclusive answer to such suggestion is that appellant has no remedy other than this suit. Appellees, in the absence of the owners, went into possession of the property under abortive foreclosure proceedings. He was therefore mortgagee in possession, and could not be ousted by ejectment or other proceeding except a bill to redeem.

Cooke *vs.* Cooper, 18 Oregon, 142.

Appellant has pursued this exclusive course, and asks to have his property restored to him.

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Courts favor redemption, and especially in a case like this, where the property is worth many times the amount of the mortgage and interest, and where, as in this case, the mortgagee has received the income from the property, which has more than paid the incumbrance.

Respectfully submitted.

W. Scott Beebe,
Attorney for Appellant.